No. 18,445

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN GLENFORD GREGORY MACLEOD,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

BRIEF FOR RESPONDENT

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JURISDICTION

The petition herein has been originally filed in this Court pursuant to Public Law 87-301 8 USC 1105[a] enacted September 26, 1961, effective October 26, 1961 (*Fleuti v. Rosenberg* [9 Cir.] 302 F.2d 652), and seeks judicial review of a final order of deportation.[1]

Giova v. Rosenberg (9 Cir.) 308 F.2d 347;
Mai Kai Fong v. INS (9 Cir.) 305 F.2d 239;
Arreche-Barcelona v. INS (9 Cir.) 310 F.2d 698;
Gallegos v. INS (9 Cir.) 310 F.2d 688.

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[1]Attached hereto as Appendix I is the decision of the Board of Immigration Appeals.

8 USC 1105 (a)(5) (Sec. 106 (a) (5), Immigration and Nationality Act, provides:

> "(5) whenever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of title 28, United States Code. Any such petitioner shall not be entitled to have such issue determined under section 360(a) of this Act or otherwise;"

From the record petitioner's birth in the United States at Albany, New York, September 21, 1930, is uncontroverted. In paragraph VII of his petition he claims to be a natural born citizen of the United States continuously since his birth.

Should this Court (A) pass upon the issues presented or (B) transfer the proceedings to the United States District Court for the district where petitioner has his residence for hearing de novo of the nationality claim and determination, as if such proceedings were originally initiated in the district court under 28 USC 2201?

The issues presented are not related to petitioner's original acquisition of nationality, but to his retention of nationality.

8 USC Section 1481(a)(5) (Section 349, Immigration and Nationality Act) provides:

> "(a) From and after the effective date of this Act a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by
>
> * * * * *
>
> "(5) voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory;"

Petitioner has made no showing to this Court directed to effecting a transfer of the proceedings to the United States District Court for hearing de novo under 28 USC 2201.

Nothwithstanding the provisions of Section 1105(a)(5) petitioner could have filed an original action in the District Court for declaratory judgment under Title 28, Section 2201. The Supreme Court in the case of *Perkins v. Elg*, 307 U. S. 325, in 1939, sustained such an action for determination of nationality by way of a declaratory judgment under said Section. In the recent decision of the Supreme Court, *Rusk v. Cort*, 369 U. S. 367, also involving an action for declaratory judgment for a judicial determination of the plaintiff's citizenship, on page 372 the Court observed, referring to the Administrative Procedure Act in conjunction with Section 2201:

> "On their face the provisions of these statutes appear clearly to permit an action such as was brought here to review the final administrative determination of the Secretary of State. This view is confirmed by our decisions establishing that an action for a declaratory judgment is available as a remedy to secure a determination of citizenship—decisions rendered both before and after the enactment of the Administrative Procedure Act. *Perkins v. Elg*, 307 U. S. 325; *McGrath v. Kristensen*, 340 U. S. 1962. Moreover, the fact that the plaintiff is not within the United States has never been thought to bar an action for a declaratory judgment of this nature. *Stewart v. Dulles*, 101 U.S. App. D. C. 280, 248 F.2d 602; *Bauer v. Acheson*, 106 F. Supp. 445; see *Flemming v. Nestor*, 363 U. S. 603."

The Court went on to hold, page 379, that:

> "a person outside the United States who has been denied a right of citizenship is not confined to the procedures prescribed by § 360(b) and (c), and that the remedy pursued in the present case was an appropriate one."

In his brief, at page 8, petitioner makes the following statement:

> "The petitioner did vote at local and provincial elections in Montreal, Quebec, Canada, object or identity of candidates not stated."

Pages 92 and 93 of the Certified Record are cited. These pages are part of *Exhibit No. 2*, the statement made by petitioner on December 18, 1961 at Seattle. This statement is consistent with *Exhibit No. 3,* (C. R.

101-104,)[2] the statement to the Consulate General of the United States at Vancouver, B. C. In his answer to question 17 of *Exhibit No. 3* (C. A. 104), petitioner states:

> "I voted in all municipal and provincial elections from September 1952 to March 1959."

From the foregoing there appears to be no genuine issue of fact concerning his birth in the United States, or his having voted in all municipal and provincial elections in Montreal, Quebec, Canada. This Court is therefore not required to transfer the proceedings to the United States District Court.

QUESTIONS PRESENTED

Court of Appeals Rule 18(c) requires a concise statement of the case. Presenting the questions involved and the manner in which they are raised, Rule 18(d), requires a specification of errors relied upon which shall set out separately and particularly each error intended to be urged.

On page 2 of his brief petitioner uses the title "Questions Presented." No questions are specified. However, as the word "erred" is used, the inference may be drawn that this section is a specification of errors.

1. The use of the Order to Show Cause is specified as error.

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[2]C.R. refers to the Administrative Record.

2. Is a recitation, not a specification of error.

3. Specifies as error, ordering petitioner deported without finding him to be a citizen of Canada.

4. Is a recitation.

5. Specifies as error the determination of loss of United States citizenship by voting in Canada.

6. Specifies as error the absence of a voting charge in the Order to Show Cause.

7. This is another recitation, not a specification of error.

From the foregoing, respondent suggests the following questions:

1. Was the proceeding properly instituted by the issuance of an Order to Show Cause?

2. Did petitioner lose his American citizenship pursuant to 8 USC 1481(a)(5), by voting at the municipal and provincial elections in Montreal, Quebec, Canada, from September 1952 to March 1959?

ARGUMENT

THE DEPORTATION PROCEEDINGS WERE PROPERLY COMMENCED BY THE ISSUANCE OF THE ORDER TO SHOW CAUSE.

Under the subheading of his brief "Argument" petitioner says:

> "The crucial point controlling this entire proceeding is that it is based on an ORDER TO SHOW CAUSE . . . erroneously alleged authorized by Sec. 242, 8 USC 1252. It is definitely clear that

> an Order to Show Cause is not authorized by the said Act or any other law."

This pronouncement of the law is wholly unsupported.

Deportation proceedings have been commenced by the issuance of an Order to Show Cause since February 6, 1956. Section 103(a) of the Immigration and Nationality Act (8 USC 1103(a)) charges the Attorney General with administration and enforcement of the Immigration and Nationality Act, and authorizes him to establish such regulations, prescribe such forms of bond, reports, etc., as he deems necessary for carrying out his authority under the provisions of the Act. Pursuant to this authority, the procedure set forth in 8 CFR 242.1 was inaugurated February 6, 1956. The new procedure ended the practice of starting the proceedings with an arrest pursuant to a warrant of arrest, and directs that thereafter expulsion proceedings would be begun by the issuance and service of an Order to Show Cause.

The historical significance of the decision of the Supreme Court in *Heikkila v. Barber*, 345 U. S. 229, may be noted at this time. The decision was handed down on March 16, 1953, and held that the only remedy available to review the final order of deportation was by habeas corpus. The Immigration and Nationality Act of 1952 became effective on December 24, 1952. On April 25, 1955, the Supreme Court in the case of *Shaughnessy v. Pedreiro*, 349 U. S. 48, held that there is a right of judicial review of deportation orders by proceedings other than habeas corpus, and that the

remedy sought in that case, to wit, a petition for declaratory relief, is an appropriate one.

The elimination of the warrant of arrest and of custody and detention followed directly after this decision and thereby relieved the Service of the necessity of maintaining facilities and quarters for such custody and detention. The procedure under CFR 242.1 has been continuously followed in all the immigration districts since 1956.

It must be particularly noted, however, that although the deportation proceeding is no longer commenced by a Warrant of Arrest, if the District Director determines that the arrest of the alien is necessary at the time of the issuance of the Order to Show Cause or thereafter, until such time as the alien is subject to supervision under 8 USC 1252(d), he may authorize the issuance of a Warrant of Arrest. (8 CFR 242.2.)

Da Silva Periera v. Murff, DC SD NY 1958, 169 F. Supp. 81;

In re Miguel, Muniz, DC WD Penna., 151 F. Supp. 173;

Abel v. United States, 362 U. S. 217, 232;

Gordon & Rosenfield, Immigration Laws and Procedure, page 521.

From the foregoing it is definitely clear that petitioner's statement that an Order to Show Cause is not authorized by the Immigration and Nationality Act of 1952 is incorrect.

Petitioner, however, having made the statement that the Order to Show Cause is unauthorized, goes on to say,

> "It casts the burden of proving innocence on the defendant, whereas the burden of proof is on the Service to prove its charge without any assistance from the accused and is a flagrant violation of Sec. 349(c), 8 USC 1481(c)."

The author of this statement is confused.

The Order to Show Cause (C. R. page 87, *Exhibit No. 1*) alleges that petitioner is not a citizen or national of the United States; that he is a native of the United States, and that he last entered the United States at Blaine, Washington, on or about December 9, 1961, when he was not then in possession of a valid unexpired immigration visa, reentry permit, border crossing identification card, or other valid entry document, and charges that he is subject to deportation pursuant to the provisions of Section 241(a)(1) of the Immigration and Nationality Act, in that at the time of entry he was within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, aliens who are immigrants not in possession of a valid unexpired immigration visa, reentry permit, border crossing identification card, or other valid entry document, and not exempted from the possession thereof by said Act or regulations made thereunder, under Section 212(a)(20) of the Act. The basic premise of the Order to Show Cause is the charge that petitioner is an alien; and that the burden

of proof was on the Service to prove petitioner to be an alien.

On pages 4 and 5 of his brief, petitioner has quoted from Section 349(c), 8 USC 1481(c), the following:

> "Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after the enactment of this subsection, or by virtue of the provisions of this or any other Act, *the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence.*"

This is an accurate quotation from the section. The burden was on the respondent to establish the loss of nationality by a preponderance of the evidence.

Petitioner then cites 8 USC 1252(b) and quotes several portions of said section. The portions with which he seems to be concerned are those related to the requirements imposed upon the Immigration Service and afforded to the respondent in any deportation proceeding: due process, a fair hearing, and that the order of deportation be founded upon reasonable, substantial and probative evidence. This is substantially the requirement of the Administrative Procedure Act. The Supreme Court of the United States, in *Marcello v. Bonds*, 349 U. S. 302, held that the Administrative Procedure Act was not applicable to the Immigration and Nationality Act of 1952, but made the following observation at page 310:

> "Throughout the debates [Congress] it is made clear that the Administrative Procedure Act does

not apply directly, but that its provisions have been specially adopted to meet the needs of the deportation process.

* * * * *

"Exemptions from the terms of the Administrative Procedure Act are not lightly to be presumed in view of the statement in § 12 of the Act that modifications must be express, cf. *Shaughnessy v. Pedreiro*, 349 U. S. 48. But we cannot ignore the background of the 1952 immigration legislation, its laborious adaptation of the Administrative Procedure Act to the deportation process, the specific points at which deviations from the Administrative Procedure Act were made, the recognition in the legislative history of this adaptive technique and of the particular deviations, and the direction in the statute that the methods therein prescribed shall be the sole and exclusive procedure for deportation proceedings. Unless we are to require the Congress to employ magical passwords in order to effectuate an exemption from the Administrative Procedure Act, we must hold that the present statute expressly supersedes the hearing provisions of that Act. * * *"

Referring again to Section 106(a)(4) of the Immigration and Nationality Act, 8 USC 1105(a)(4), this Court is charged with the responsibility of determining the petition solely upon the administrative record, upon which the deportation order is based, and "the Attorney General's findings of fact if supported by reasonable, substantial and probative evidence on the record, considered as a whole, shall be conclusive."

The petitioner goes on to make some point of the absence of a claim by the Service during the hearing or proceedings that petitioner is or ever was a citizen of Canada. By an inverse process of what he calls logic, he says,

> "If the petitioner is not a citizen of Canada he is not an alien."

He then says that,

> "No additional charge was lodged during the hearing or at any other time."

From this it may be inferred that he contends that the Order to Show Cause is defective in not containing a charge of loss of American citizenship. The Order to Show Cause charges that the respondent [the petitioner] is an alien, that he is "not a citizen or national of the United States." The Order to Show Cause also charges, under Section 241(a)(1) of the Immigration and Nationality Act that at the time of his entry into the United States he was within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, aliens who are immigrants not in possession of a valid unexpired immigration visa, etc.

The procedural steps involved in this Order to Show Cause with regard to the burden of proof were the following:

Petitioner's reply would have been to establish his birth in the United States, and the fact of his citizenship because of such birth. The burden of proof then

shifted to the Service, to show, and by a preponderance of the evidence under Section 349(c) of the Immigration and Nationality Act, 8 USC 1481[c], that the citizenship derived from his native birth was lost pursuant to the provisions of Section 349(a), 8 USC 1481, by the admitted fact that petitioner did vote at local and provincial elections in Montreal, Quebec, Canada. Thus, with the fact that he is an alien established, this coupled with the additional fact that he was not in possession of a valid unexpired immigration visa, or other valid entry documents, etc., under Section 212(a)(20) of the Immigration and Nationality Act, made him deportable under Section 241(a)(1) of said Act.

PETITIONER LOST HIS CITIZENSHIP UNDER 8 USC 1481(a)(5) BY VOTING IN MUNICIPAL AND PROVINCIAL ELECTIONS IN CANADA.

Petitioner cited the controlling case of *Perez v. Brownell*, 356 U. S. 44. The *Perez* case was concerned with the constitutionality of Section 401(e) of the Nationality Act of 1940. 401(e) was reenacted into the Immigration and Nationality Act of 1952, and Section 349(a)(5), 8 USC 1481 (a)(5) contains the identical language of Section 401(e). The constitutionality of Section 401(e) was upheld by the majority of the Court. Justice Frankfurter expressed the opinion of the majority in part as follows (page 57):

> "The first step in our inquiry must be to answer the question: what is the source of power on which

Congress must be assumed to have drawn? Although there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation.

* * * * *

"The inference is fairly to be drawn from the congressional history of the Nationality Act of 1940, read in light of the historical background of expatriation in this country, that, in making voting in foreign elections (among other behavior) an act of expatriation, Congress was seeking to effectuate its power to regulate foreign affairs.

* * * * *

"Since Congress may not act arbitrarily, a rational nexus must exist between the content of a specific power in Congress and the action of Congress in carrying that power into execution. More simply stated, the means—in this case, withdrawal of citizenship—must be reasonably related to the end —here, regulation of foreign affairs."

* * * * *

"Our starting point is to ascertain whether the power of Congress to deal with foreign relations may reasonably be deemed to include a power to deal generally with the active participation, by way of voting, of American citizens in foreign political elections. Experience amply attests that, in this day of extensive international travel, rapid communication and widespread use of propaganda, the activities of the citizens of one nation when in another country can easily cause serious

> embarrassments to the government of their own country as well as to their fellow citizens.
>
> * * * * *
>
> "It follows that such activity is regulable by Congress under its power to deal with foreign affairs."

In the face of this decision of the Supreme Court, petitioner has not directly challenged the constitutionality of Section 349(a)(5). However, on page 10 he cites the Supreme Court decision of *Trop v. Dulles,* 356 U. S. 86, wherein he says it was held:

> "That the law [Section 401(g)] is unconstitutional, penal, and that power to denationalize is not vested in the military authorities,"

and then goes on to say that,

> "By the same token and under the same statutes a Special Inquiry Officer of the Immigration and Naturalization Service * * * is not authorized to decitizenise any full blood native born citizen. It would be amazing to hold such power possible in the fact of authorities cited. Cf. *Kawakita v. United States,* 343 U. S. 717, 72 Sup. Ct. 950; *Baumgartner v. United States* and authorities cited, 322 U. S. 665, 64 Sup. Ct. 1240."

By this language it would appear that petitioner, though not directly challenging the constitutionality of Section 349(a)(5), is intimating to the Court that said section is unconstitutional. Mention is again made to the advantage to the petitioner of an action in United States District Court under Title 28, Section

2201, for declaratory judgment, as well as the provisions of Section 106(a)(5) of the Immigration and Nationality Act, P.L. 87-301, 8 USC 1105 (a)(5), upon a showing that his claim to nationality is not frivolous, and that a genuine issue of material fact is present, for a de novo judicial hearing under Section 2201 in the United States District Court.

The conclusion must be reached that there is no issue of material fact and that petitioner is confronted with the decision of the Supreme Court in *Perez*, upholding the constitutionality of Section 401(e) of the Nationality Act of 1940, and that he has not undertaken to challenge the constitutionality of Section 349(a)(5) of the 1952 Act.

On page 9 of his brief, the following language is quoted from the majority opinion in the *Perez* case, page 60:

> "It follows that such activity is regulable by Congress under the power to deal with foreign affairs. And it must be regulable on more than ad hoc basic. The subtle influences and repercussions with which the government must deal make it reasonable for the generalized, although clearly limited, category of 'political election' to be used in defining the area of regulation. That description carries with it the scope and meaning of its context and purpose; classes of elections—non-political in the colloquial sense—as to which participation by Americans could not possibly have any effect on the relations of the United States with another country are excluded by any rational construction of the phrase."

Following that quotation, petitioner adds the statement:

> "The petitioner did not involve himself with any foreign state. He did not vote in any foreign national or federal election."

Following this statement, a quotation is added, which it is presumed is derived from the case of *Fong Haw Tan v. Phelan*, 333 U. S. 6. The position in which it is inserted, following the quotation from *Perez*, and the petitioner's statement that he did not involve himself with any foreign state can hardly be considerable applicable.

CONCLUSION

It is respectfully submitted that the use of the Order to Show Cause in accordance with 8 CFR 242 was entirely proper, the final deportation order, subject to review by this Court, is supported by reasonable, substantial and probative evidence on the record, considered as a whole; that the petitioner was at all times accorded a fair hearing and due process; and that the order of deportation is valid. The petition should be dismissed.

Dated, San Francisco, California,
July 26, 1963.

Respectfully submitted,

CECIL F. POOLE,
United States Attorney,

CHARLES ELMER COLLETT,
Assistant United States Attorney,

Attorneys for Respondent.

Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with these rules.

Charles Elmer Collett,
Assistant United States Attorney.

(Appendix I Follows)

Appendix.

Appendix 1

U. S. Department of Justice
Board of Immigration Appeals

File: A-12510982—Seattle Nov. 7, 1962

In re: John Glenford Gregory MacLeod
In Deportation Proceedings

APPEAL

Oral Argument: October 10, 1962

On behalf of respondent:
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302 Second & Cherry Bldg.
Seattle 4, Washington
(Counsel did not appear)

On behalf of I&N Service:
Irving A. Appleman, Esq.

Charges:

Order:
Sec. 241(a)(1), I&N Act (8 USC 1251(a)(1))—Excludable at entry under Section 212(a)(20)—No valid immigrant visa or other valid entry document

Lodged: None

Application: Voluntary departure in lieu of deportation

This is an appeal from the order of the special inquiry officer finding respondent deportable upon the

ground stated above and granting him voluntary departure.

Respondent was born in the United States on September 21, 1930; he was taken to Canada at an early age. He was admitted to the United States in March 1959, apparently as a United States citizen. He last entered on December 9, 1961 to resume his residence in the United States. He was then admitted as a United States citizen. The Service charges that respondent lost United States nationality by voting in a political election in Canada. The law relied upon by the Service provides as follows:

> From and after the effective date of this Act, a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by——
>
> voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; (section 349(a)(5) of the Act, 8 USC 1481 (a)(5))

The Service claims that respondent voted in political elections in Canada from 1952 to 1959. The respondent refused to testify claiming that the burden was upon the Government to prove its case and that he was not required to be a witness. In proof of its claim, the Service introduced two statments. The first came from the official files of the Consulate General of the United States at Vancouver, British Columbia, Canada (Ex. 3.) This statement which purports to be made by the respondent was admitted without objection by counsel;

it reveals that on October 25, 1961, respondent furnished the Consulate with the information that he had voted in Canadian municipal and provincial elections from September 1952 to March 1959. The second statement, consisting of questions and answers, taken by a Service officer under oath on December 18, 1961 reveals that respondent was a registered voter in Canada, that his name was on the voters' list during each of the years from 1952 to 1959, that he voted in both provincial and city elections from September 1952 to March 1959 and that he had not voted in Dominion elections.

Objections to the use of the first statement were made by counsel. His position is that, the information contained therein has not been sworn to, it is not substantial evidence, and it is immaterial (p. 4, brief of counsel dated August 28, 1962). Objection to the introduction of this exhibit was originally taken on the ground that the parties responsible for making it were not present for cross-examination (p. 10) and later on the ground that it had no "particular bearing on the merits" (p. 15). We find the statement material. Counsel was offered an opportunity to take depositions of the person involved in Canada (p. 10) and, of course, the respondent who made the statement (apparently alone and sent it to the Consulate) was present and available to affirm or deny the contents of the statement. Moreover, the admissions against interest contained in Exhibit 3 are corroborated by those contained in Exhibit 2 which was made a part of the record without objection by counsel. The fact

that Exhibit 3 was not sworn (or that Exhibit 2 was not signed) goes to the weight of the evidence not to its admissibility (8 CFR 242.14(c)). We find no judicial error committed in admitting Exhibit 3. In fact, the admissions contained in Exhibit 2 could alone support the finding that respondent had voluntarily voted in Canada.

Neito v. McGrath, 108 F. Supp. 150 (S.D. Texas, 1951), *Fotie v. United States*, 137 F. 2d 831, 838 (8th Cir., 1943), *Bridges v. Wixon*, 326 U.S. 135, 150-2 (1945) and *McNeil v. Kennedy*, 298 F. 2d 323, C.A.D.C. (1962), cited by respondent are not applicable. Neito's expatriation was sought on the ground that he had voted; he denied that he had voted. The respondent here does not deny having voted. Proof of voting in Neito was in the form of a statement from a Mexican official who, the record showed, did not have custody of voting records, and whose certification was deficient in that it did not identify Neito or the particular election involved. Proof of voting here consists of uncontradicted admissions made by the respondent. Fotie was criminally prosecuted for falsely representing he had been born in the United States while registering as a voter; the Government had the burden of proving that the claim to birth in the United States was willfully false. To carry this burden, it relied upon admissions against interest made by Fotie. The court pointed out that the admissions were not sufficient since they were balanced by claims to birth in the United States—claims based upon an apparently valid belief; and furthermore, the

court pointed out that the Government was unable to establish that Fotie was born abroad. In the instant case, of course, the respondent's admissions that he voted in Canada are uncontradicted. *Bridges* involved a statement admitted in a deportation proceeding in violation of the regulations. Both statements in the instant case were admitted in accordance with the rules (8 CFR 242.14(c)). In *McNeil* the Government relied upon certain documents to establish that McNeil had been born in a foreign country. The documents were a foreign certificate of baptism, a record from a foreign school, and a hospital record from Hawaii. These records were unverified or unauthenticated. In the instant case, the documents are properly authenticated; they are reasonable, substantial, and probative proof that respondent voluntarily voted in a political election in a foreign state.

Counsel contends that expatriation results from voting in a political election in a foreign state only when the election is national in character. He contends, therefore, that voting in elections of political subdivisions (province and municipality) as respondent did, cannot result in loss of nationality. We have decided that voting in a political election on either a national or local scale will bring about expatriation (*Matter of L——*, Int. Dec. 1244). *Perez v. Brownell,* 356 U.S. 44, 59-60 (1958) relied upon by counsel as eliminating as a ground of expatriation, voting in a "nonpolitical in a colloquial sense" election, does not affect the result here. The special inquiry officer has taken administrative notice that voting in a provincial

election involves the selection of members of a legislative assembly. A vote for a member of a provincial legislature obviously does not fall in a "nonpolitical" category (*Matter of L——*, supra).

Counsel contends that since neither the character nor object of voting is shown, nor are the names of the candidates stated, the Service proof is defective. We think the nature of the election was the proper subject of administrative notice. Counsel was notified by the order of the special inquiry officer that administrative notice had been taken. Counsel produced no evidence that voting in provincial elections in the years in question could have been for any purpose other than voting for a candidate for political office.

The special inquiry officer found that respondent's father was a citizen of Canada at the time of respondent's birth. No finding was made as to whether respondent was a national of Canada at the time he voted. While there is some indication in *Perez*, supra, that the power of Congress to declare that expatriation follows voting in a foreign election is limited to those who have the nationality of the foreign country, the intent of Congress is clear that loss of nationality by voting should result whether or not the person voting had the nationality of the foreign country (see *Matter of P——*, I&N Dec. 267, 269-70 which concerned the predecessor of the section before us). However, if the place of birth of the respondent's father is a fact in issue, we believe that the record establishes that respondent's father was born in Canada.

Counsel alleges that the special inquiry officer was improperly influenced by administrative actions which allegedly took place prior to the hearing and by the fact that the special inquiry officer's supervisor was present at the deportation hearing. At oral argument, the Service representative expressed his concern at the nature of these representations. Affidavits, copies of which have been served upon counsel, have been filed with the Board by the examining officer, the special inquiry officer, and the supervisor of the special inquiry officer. After careful consideration of the matter, we find that the charges of counsel are unsupported and unfounded. There is nothing to show the decision was not made solely upon facts of record. There is nothing to show the use of ex parte influence upon the special inquiry officer. The facts of record raise no question of credibility, and we may point out the only issue which permitted discretion (the application for voluntary departure) was decided in favor of the respondent. A pure question of law is involved. The special inquiry officer, following precedents of this Board, could have arrived at no other decision upon this record than that respondent had lost United States citizenship by voting in a political election in Canada.

Although respondent did not testify on the issue of deportability, counsel charges that an attempt was made to coerce respondent into testifying. This is denied by all the Service participants. There is no affidavit from respondent to substantiate counsel's

contention. An examination of the record reveals no foundation for the charge. It must be dismissed.

Counsel complains that respondent was not granted a fair and impartial hearing. The allegations are completely unsupported by the record. There was a full and fair compliance with the law and regulations pertaining to the conduct of the hearing. Counsel had every opportunity to examine the evidence presented by the Service and to present such evidence as he desired and to make such points as he desired.

Counsel contends that the Order to Show Cause is defective since it did not set forth the manner in which American citizenship was lost, thus depriving respondent of an opportunity to meet the issue of expatriation. The contention must be rejected. The Order to Show Cause charges that the respondent is an alien, that he is "not a citizen or national of the United States". This is sufficient to place him on notice. At the hearing, respondent made no request that he be informed of the ground on which he was considered to have lost United States citizenship. This is true even though the hearing held on June 20, 1962 was adjourned to June 22, 1962 and respondent was represented by capable counsel at all times. It appears obvious that the parties at all times understood that expatriation had resulted by reason of voting in Canada. The special inquiry officer made this finding and no request is made for reopening of proceedings to advance evidence which would refute this conclusion. The function of an Order to Show Cause is to notify an alien

of the ground on which the Government considers that he is deportable. This function was fulfilled here. The Order to Show Cause charges that the respondent, an alien, last entered the United States without the documents needed by an alien. The record establishes the charge.

Counsel contends it was improper to commence proceedings by issuance of an Order to Show Cause rather than by a warrant of arrest. The Order to Show Cause was issued under the regulations (8 CFR 241.1); we are without authority to question the validity of these regulations.

We agree with the special inquiry officer that the burden of proof is upon the Government and that it is not required to carry this burden by more than a preponderance of the evidence. We believe this burden has been met.

Counsel's contentions concerning respondent's refusal to testify need not be discussed since no inference has been taken from the refusal although in our opinion an inference is proper. Counsel requests that our decision be certified to the Attorney General. A request by an alien for certification of our decision to the Attorney General is not authorized by the regulations (8 CFR 3.1 (h)). We see no reason to refer the case to the Attorney General for review. Counsel requests that relief be granted. The special inquiry officer granted voluntary departure. No other relief is indicated. All other contentions of counsel, whether contained in his brief, or reply brief or made at the

hearing, although not specifically set forth in this order have been considered. The brief of the trial attorney in support of the special inquiry officer's decision has been considered.

Order: It is ordered that the appeal be and the same is hereby dismissed.

Thos. S. Fruicane,
Chairman.